CRIMINAL APPEAL (DB) No.138 OF 1988
WITH
CRIMINAL APPEAL (DB) NO.178 OF 1988
WITH
CRIMINAL APPEAL (DB) NO.182 OF 1988
WITH
CRIMINAL APPEAL (DB) NO.183 OF 1988
WITH
CRIMINAL APPEAL (DB) NO.184 OF 1988
WITH
CRIMINAL APPEAL (DB) NO.186 OF 1988

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Against the judgment and order of conviction dated 22.2.1988, passed by Sri Om Prakash Sinha, 2nd Additional Sessions Judge, Nalanda at Biharsharif in Sessions Trial No.258 of 1986/ 10 of 1987.

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KRISHNA MURARI MAHTON @ KRISHNA MURARI PRASAD:.. Appellant
(in Cr. Appeal (DB) No.138 of 1988)
ARUN MAHTON @ ARUN KUMAR: .... Appellant
(in Cr. Appeal (DB) No.178 of 1988)
SHAILENDRA MAHTO @ SHAILENDRA PRASAD: ..... Appellant
(in Cr. Appeal (DB) No.182 of 1988)
BAHADUR MAHTO @ INDERJIT @ INDERJIT SINGH: ... Appellant
(in Cr. Appeal (DB) No.183 of 1988)
KAUSHLENDRA PRASAD @ KAUSHAL MAHTON: ..... Appellant
(in Cr. Appeal (DB) No.184 of 1988)
SURENDRA PRASAD @ SULI MAHTON: ..... Appellant
(in Cr. Appeal (DB) No.186 of 1988)

Versus

THE STATE OF BIHAR: .... Respondents
(in all appeals)

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For the Appellants: (in Cr.App.(DB) No.138/88) — Mr. Rana Pratap Singh, Senior Advocate with Mr. Bal Mukund Prasad Sinha Advocate

For the Appellants: (in Cr.App.(DB)No.178/88) — Mr. Surendra Singh, Senior Advocate with Mr. Hemant Kumar Jha, Advocate.

For the Appellant: (in Cr. App.(DB) No.182/88) — Mr. Chitranjan Sinha Senior Advocate with Mr. Binoy Kumar, Advocate.

For the Appellant: (in Cr.App.(DB)No.183/88) — Mr. Rana Pratap Singh, Senior Advocate with Mr. Anjani Kumar Advocate.

For the Appellant: (in Cr. App.(DB) No.184/88) — Mr. Anjani Kumar Advocate.

For the Appellant: (in Cr.App.(DB)No.186/88) — Mr. Manu Shankar Mishra, Advocate.

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For the State : (in all cases) — Mr. Lala Kailash Bihari Prasad Public Prosecutor.

P R E S E N T

THE HON'BLE MR. JUSTICE SUDHIR KUMAR KATRIAR

THE HON'BLE MR. JUSTICE SYED MD. MAHFOOZ ALAM

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S K Katriar, J. The six appellants have preferred the six appeals arising out of a common judgment dated 22.2.1988, passed by the learned 2nd Additional Sessions Judge, Nalanda at Biharsharif, in Sessions Trial No.258 of 1986/10 of 1987 (The State of Bihar Vs. Shailendra Mahton and five others), whereby Arun Mahto alias Arun Kumar has been convicted under section 302 of the Indian Penal Code. The remaining appellants, namely, Krishna Murari Mahton alias Krishna Murari Prasad, Shailendra Mahton alias Shailendra Prasad, Bahadur Mahto alias Interjit alias Inderjit Singh, Kaushlendra Prasad alias Kaushal Mahton, and Surendra Prasad alias Suli Mahton have

been convicted under section 302 read with section 34 of the IPC. All the six appellants have been sentenced to undergo rigorous imprisonment for life.

2. The prosecution case is that on 7.3.1986, at 10.45 A.M., the informant Budhram Prasad (P.W.6), along with deceased Vijay Yadav got into a Rajya Transport bus bearing no.BHY 1355, at village Nakatpura to go to village Poj. When the bus reached village Muhammadpur, the accused persons came on two motor-cycles from the west and stopped their motor-cycles in front of the bus. They threatened the driver that he would be done to death if he drove the bus ahead. Accused Arun Mahton, Shailendra Mahton, and Bahadur Mahton had arrived on one motor-cycle, and Kaushal Mahton, Surendra Prasad alias Suli, and one more accused whose name he did not remember at that time had approached on another motor-cycle. Accused Arun Mahton, Shailendra Mahton and Kaushal Mahto were armed with rifles. Accused Bahadur Mahton and one other accused whose name was not known to the informant were wielding guns. Accused Surendra Prasad alias Suli was armed with a country-made pistol in his hand. All the accused persons got down from the motor-cycles and surrounded the bus. In the meantime, five to six persons emerged from the medicine shop of Dr. Ramnandan Prasad and came near the bus. Some of

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them were armed with pistols. They asked the passengers of that bus to get down. The accused persons did not allow Vijay Yadav to get down from the bus. The informant got down from the bus out of fear. When all the passengers of the bus got down and only Vijay Yadav was left in it, accused Arun Mahton fired the first shot from his rifle on Vijay Yadav. After him accused Shailendra Mahton, Kaushal Mahton, Bahadur Mahton and Surendra Mahton also fired from the fire-arms they were wielding, at Vijay Yadav due to which he died in the bus itself. Thereafter all the accused persons left the place on their motor-cycles. While the accused persons were fleeing away, one motor-cycle fell on the ground and the accused persons fled away towards Sherpur, leaving behind the motor-cycle. Many residents of Nakatpura including Lakhana Yadav, Baudhu Yadav, Misar Yadav and others were present there and had witnessed the occurrence. It has been alleged that murder of one Sudhir Mahton a few years ago was the motive for the occurrence. It was suspected that the deceased had his hand in the murder of Sudhir Mahton leading to the retaliation in the murder of Vijay Yadav. The Fardbeyan (Ext.2) of P.W.6 was recorded by J.K. Sharma, S.I. of Police of Asthawan P.S., on 7.3.1986, at 12.00 P.M, at village

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Muhammadpur on the basis of which formal F.I.R. (Ext.3) was drawn.

3. Investigation commenced. After completion of investigation charge-sheet was submitted, cognizance of the alleged offences was taken and the case was committed to the court of sessions. Charge against Arun Mahton was framed under section 302 of the IPC as well as section 27 of the Arms Act. Charges were framed against the remaining accused persons under section 302 read with section 34 of the IPC. Charges were framed and explained to the accused persons. They pleaded not guilty and claimed to be tried. The defence of the accused persons was that they have been falsely implicated in this case due to enmity.

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4. The prosecution examined nine witnesses in support of its case. P.W.1 (Rajendra Gope), P.W.2 (Raghubir Yadav), P.W.3 (Ram Lakhan Yadav), P.W.4 (Suresh Prasad), P.W.5 (Baudhu Gope), P.W.6 (Budhram Prasad), and P.W.7 (Rajo Yadav), are eye witnesses. P.W.8 is Sub-Inspector of Police who had investigated the case and submitted charge-sheet. P.W.9 is the Deputy Superintendent of Sadar Hospital, Biharsharif, who had conducted the post-mortem on the dead body of Vijay Yadav, the deceased.

5. The following documents were marked as exhibits on behalf of the prosecution:

(i) Exhibit-1 - Signature of Suresh Prasad on the seizure-list.

(ii) Exhibit-1/1 - Signature of Krishna Prasad on the seizure-list.

(iii) Exhibit-1/2 - Signature of Suresh Prasad on the inquest report.

(iv) Exhibit-1/3 - Signature of Krishna Prasad on the inquest report.

(v) Exhibit-2 - Fard-beyan

(vi) Exhibit-3 - Formal F.I.R.

(vii) Exhibit-4 - Seizure-list

(viii) Exhibit-4/1- Seizure-list in which Rajdoot motor-cycle was seized.

(ix) Exhibit-5 - Carbon copy of death inquest.

(x) Exhibit-6 - Post-mortem report.

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6. The following are the material exhibits on behalf of the prosecution:

a. Exhibit-I - Casette No. S.C.I.
b. Exhibit-II - Bullet (cartridge)
c. Exhibit-III - Bushirt
d. Exhibit-IV - Full pant

7. The defence examined one witness, namely, Dr. Suresh Kumar Verma, in support of its case to prove the case of alibi set up by accused Arun Mahto. The defence also proved O.T. slip of Sadar Hospital, Muzaffarpur, which has been marked Exhibit-A.

8. On a consideration of the materials on record, the learned trial court found that the occurrence had taken place in Bus No.BHY-1355 at village Nakatpura. Accused Arun Mahton had fired the first shot at Vijay Yadav from his rifle, followed by fire-arm shots from the remaining appellants, as a result of which he died inside the bus. He, therefore, convicted and sentenced all the six appellants in the aforesaid manner. They were, however, acquitted of the charge under section 27 of the Arms Act because of absence of the necessary sanction in terms of section 30 of the Arms Act.

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9. I would prefer to consider the evidence of the informant (P.W.6) first of all. He is Budhram Prasad, an agriculturist by avocation, and साढ़ू (co-brother) of the deceased. Both of them are *Gharjamai* and living in their Sasural because their wives have no brother. About 17 months ago they had together left their Sasural and boarded a Rajya Transport bus at village Nakatpura to go to Barbigha to purchase a buffalo. The bus had stopped at village Muhammadpur to enable passengers to get down and get in. As soon as the bus had stopped, two motor-cycles with three persons on each arrived and parked the same in front of the bus. One of them went near the driver’s door, abused him in foul language and said that he would be

shot dead if he had taken the bus forwards. Arun, Shailendra and Kaushal were armed with rifles, and Bahadur and Suli were armed with pistols. The sixth person whose name he was unable to recall was armed with a gun. At this point of time, six persons armed with pistols emerged from the medicine shop of Dr. Ramanandan situate nearby. Arun had forced the driver to get out of the bus. The other five motor-cycle riders went to the rear gate of the bus and started forcing the passengers to come out of the bus. The persons who had emerged from the medicine shop of Dr. Ramanandan stood at the driver's door. All the passengers got out of the bus except Vijay Yadav. The informant also got out of the bus and stood on a raised place near the medicine shop. Arun came back to the rear door, entered the bus and fired at Vijay from his rifle. The other five accused persons also fired at Vijay. He had received injuries in his stomach (*कोख*) and his chest, as a result of which he died. The six accused persons got on their motor-cycles and fled away. One of the motor-cycles slipped a little distance away, in village Sherpur, which was abandoned and the riders ran towards Sherpur village. The six persons who had emerged from the medicine shop of Dr. Ramanand ran away towards the village. The informant identified Arun, Shailendra, Bahadur,

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Kaushal and Suli who were present in court and recognised them. The sixth person was not present in court. He claimed that he can recognise him also. The Sub-Inspector of Police reached the place of occurrence and took down the fardbeyan of the informant which was read over to him and he affixed his thumb-impression marked Exhibit.2.

9.1) P.W.6 has stated in his cross-examination that he was about 15-20 years ago married to the daughter of Tek Lal of village Nakatpura. The second daughter was married to Vijay Yadav (the deceased). Both were co-brothers (*साढ़ू*), and cultivators, P.W.6 being the elder one. Both of them are engaged in cultivation. He has further stated in his cross-examination that both of them had taken their meals before they had left their residence to catch the bus. The informant had taken rice, pulses and vegetables. Vijay had taken his meal separately. He was not aware as to what food Vijay had taken. It had taken about 10 minuts from Nakatpura to reach Muhammadpur. After the accused persons had got down from their motor-cycles, they had started shouting "*पकड़ो-मारो*". They were mentioning Vijay Yadav's name also. He claims to be recognising the motor-cycle riders from before for about 2-3 years. They used to perform Saraswati Puja at Yadav's Lodge where he also used to visit and had

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recognised them since then. He was not aware about the avocations of the motor-cycle riders. He has further stated in his cross-examination that he used to supply milk to them. There was no problem about payments. The six persons who had emerged from the medicine shop stood at the driver's door. They had not surrounded the bus. None of the passengers had resisted the accused persons. Vijay had not attempted to escape from the bus. P.W.6 had made no attempt to save and protect Vijay out of sheer fear. The accused persons had not misbehaved or ill-treated any one of the passengers including the informant. He had noticed the accused persons when he was getting out of the bus. There was no exchange of words with them. He knows a few residents of Muhammadpur. After getting out of the bus, he had requested a few residents of Muhammadpur to save and protect Vijay but they had expressed their helplessness. Yadavs are also amongst the residents of Muhammadpur. Vijay was looking from inside the bus and had called for help. He (P.W.6) said that he was helpless and was unable to do any thing. Most of the passengers got scattered and only a few remained there. The six persons who had emerged from the medicine shop had not fired any shot. All persons present there including the passengers and the shop-keepers kept quiet and made

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no attempt to control the situation. No teacher or student from nearby middle-school or high school came there. He had re-asserted that, after getting out of the bus, he had proceeded towards the medicine shop and stood on a raised place and was, therefore, able to witness the occurrence. He has stated that he had seen Indradeo near the medicine shop, but no other acquaintance was present there. 5-6 shots had been fired and people had started running away after hearing the sound of the shots. He had denied the suggestion that Indradeo Yadav had gone to the medicine shop to call Dr. Ramanandan or that Indradeo had seen the occurrence. Arun had fired the first shot as a result of which Vijay had fallen down. The accused persons had left the bus about 5-6 minutes thereafter and the informant (P.W.6) had entered the bus after a minute or two.

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9.2) He has further stated in paragraph 47 of his cross-examination that he knew all the accused persons as well as the names of their fathers. He knew them at the time of occurrence also. He had expressed complete unawareness about the death of Sudhir. He has denied the suggestion as to the details of the trial regarding the murder of Sudhir. He has in paragraph 52 of his cross-examination denied the suggestion that Vijay had taken liquor. He

has stated in paragraph 54 of his cross-examination that he had met Vijay at 6.00 to 7.00 A.M.. Both were going to Barbigha for purchase of buffalos. P.W.6 was carrying 3,500/- in cash for the purchase. He has further stated that Vijay was not drunk at the time they left their residence. Both of them had got seats in the bus on the left side of the engine. Arun had pointed his rifle at Vijay, as a result of which he could not get out of the bus. The firings in the bus had taken place after he had got out of the bus. After Arun had fired the shots, five more shots were fired at him. He had noticed P.W.3 (Lakhan), P.W.5 (Baudhu), P.W.1 (Rajendra), P.W.7 (Rajo), and Mishra near the dead body. Hira Chaukidar, resident of village Muhammadpur, had informed the police whereafter the Sub-Inspector of Police had arrived.

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9.3) On a close scrutiny of the deposition of P.W.6, it appears that he has fully supported the prosecution case, and the defence has not been able to elicit any contradiction in his deposition. He and Vijay Yadav deceased had left Nakatpura together in the bus. As soon as the bus had reached Nakatpura, it was surrounded by the six appellants who had come on two motor-cycles variously armed. He was unable to recall the name of Krishna Murari but he asserted that he can recognise him on seeing him. Arun had

got into the bus first of all and fired at Vijay Yadav from a point-blank range. This was followed by gun-shots by the remaining five appellants who were standing in the rear portion of the bus. He along with other co-passengers particularly of Nakatpura were unable to save and protect him out of sheer fear. Arun had fired the first shot, as a result of which Vijay had fallen down. This was followed by fire-arm shots by the remaining five appellants who were standing inside the bus in the rear. Though P.W.6 has stated that he and Vijay had taken food before leaving the residence to get the bus, but he states that they had not taken food together and was not aware as to what food Vijay had taken giving rise to the possibility that Vijay may or may not have taken anything before leaving their residence. He claims to have known the appellants for some time.

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10. P.W.1 (Rajendra Gope) is an agriculturist, and a resident of Nakatpura. He was travelling by the same bus to Barbigha Hat along with Budhram Gope and Vijay. He had boarded the bus along with Budhram Gope and Vijay at village Nakatpura at about 11.00 A.M. The bus stopped at village Muhammadpur to enable passengers to get down and board the bus. Two motor-cycles with three persons on each had stopped in front of the bus. All the six

persons got down, surrounded the bus, started talking in abusive language and had the passengers out of the bus. Only Vijay remained inside the bus. He was stopped from coming out of the bus at the gun point by Arun, Shailendra, Bahadur, Kaushal, Suli and one more person. They all were carrying fire arms. Dr. Ramanand's shop was close by. 5-6 persons emerged from his shop whom he was unable to recognise. Kaushal, Shailendra, Bahadur and Suli had surrounded the bus in the rear. The persons who had come out of Ramanand's shop were at the driver's door. Arun Mahto came to the rear gate of the bus. He shot at Vijay Yadav. This was followed by indiscriminate firing by other accused persons. Vijay dropped dead, whereafter the accused persons went away in different directions. He recognised Suli alias Surendra, Arun, Bahadur and Kaushal who were present in court. Shailendra was not present in the court room. He asserted that he can recognise Shailendra also.

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10.1) He has stated in his cross-examination that he knew the accused persons from before. He used to supply milk to them and that is how he recognises them. Nakatpura and Muhammadpur are separated by "*एक कोस*". Nakatpura and Barbigha are separated about "*पांच कोस*". He was going to Barbigha market. It had taken a total of 10 minutes after the bus was cleared of the

passengers. He had himself got out of the bus out of sheer fear. The accused persons were standing at the gate when he was getting out of the bus. They had not threatened him and he had gone towards the shop of Dr. Ramanand. Budhram was also standing with him. Some of his co-villagers were also standing where Rajo (P.W.7), Lakhan (P.W.3), Raghubir (P.W.2), Baudhu (P.W.5), and Mishri Gope were present. We do not remember the names of other persons. They were standing on Tilha. The Tilha was about "दो-तीन हाथ"away from the bus. P.W.1 and Budhram also stood on the Tilha. The Tilha was up to waist height and had a circumference of "चार-पांच हाथ". He has further stated in his cross-examination that the accused persons had confined Vijay in the bus and did not allow him to get up from his seat. Arun Mahto was pointing a rifle at his chest. The remaining accused persons were standing at the rear-gate. Vijay wanted to get out of the bus but were prevented by the accused persons at gun point.

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10.2) On a close perusal of the deposition of P.W.1, it appears that he is a co-villager and a resident of Nakatpura, had travelled with P.W.6 and the deceased in the same bus. He has also stated that Arun was first to fire shot at Vijay from point-blank range. Vijay Yadav dropped dead. This was followed by

indiscriminate firing by other accused persons. He had witnessed the entire occurrence while standing on the *Tilha.* He had fully supported the mode and manner of the occurrence, as well as participation of the six appellants in the manner stated in the Fardbeyan, and the defence has not been able to elicit any contradiction in his testimony.

11. The evidence of P.Ws.2 to 5 are on the same lines as P.Ws.1 and 6. P.W.2 (Raghubir Yadav) is an agriculturist and resident of Nakatpura. He had on that day, at about 11.00 A.M., gone to the clinic of Dr. Ram Nandan to give him a call. When he reached there, he noticed that a bus had reached there from the west and stopped. Two motor-cycles with Arun, Bahadur, Shailendra, Kaushal, Suli and Krishna Murari came and stopped in front of the bus. They were armed with rifles and guns. Arun had forced the passengers to get out of the bus. Vijay Yadav was not allowed to come out of the bus. In the meantime, 5-6 persons emerged from the shop of Dr. Ram Nandan and he recognised Dinesh, Devendra and Kishori amongst them. Arun Mahto entered into the bus through the rear door and shot at Vijay Yadav. Shailendra, Bahadur, Kaushal, and Suli also fired shots at Vijay, as a result of which he died in the bus. On hulla being raised, the accused persons fled away on the two motor-cycles.

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One motor-cycle fell down about 100 yards away whereafter all of them took to their heels. He identified Shailendra, Suli, Bahadur, Arun and Kaushal who were present in court. Krishna Murari was not present in court on that day. He claimed that he recognises Krishna Murari and can identify him.

11.1) He has stated in his cross-examination that he had gone to fetch Dr. Ram Nandan because his daughter Saroj Kumari was unwell. Indradeo Yadav was also present in the Dr. Ram Nandan's dispensary on that day. He visits Muhammadpur once or twice every month. Dr. Ram Nandan or his compounder was not present in the dispensary when he reached there. Arun was initially standing at the driver's door and the remaining accused persons were at the rear door. The driver was forced to come out of the bus due to abusive language and threat of gun-shot. There was a *Tilha* between Dr. Ram Nandan's clinic and the bus. He perched himself on the *Tilha* along with 5-6 more persons. Except one or two persons, all the remaining persons from his village were on the Tilha. There were about 50 persons in the bus, all of whom except Vijay came out of the bus without protest carrying their belongings in their hands, and dispersed. No one attempted to save and protect Vijay. Budhram and Rajendra, co-villagers, also stood on the *Tilha*. They

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felt helpless because of the sight of rifle. He knew the accused persons for one to two years. He used to meet them at Yadav lodge where they assemble for Puja. He has further stated in his deposition that when the case relating to the other Vijay Yadav (not the Vijay Yadav deceased of the present case) was in progress, he used to watch the proceedings. He has denied the suggestion that the said case had given rise to caste frenzy between the Yadavas and Kurmis. He has further stated in his deposition that he did not say anything out of fear. People reached there about 15-20 minutes after the accused persons had fled away. The driver's door had been obstructed by Arun. The remaining five accused persons were at the rear gate, who had not allowed Vijay to come out of the bus. He had stayed there till the arrival of the police. The police had arrived there about 2-2$^{1}/_{2}$ hours after the occurrence. He had gone inside the bus to have a look at Vijay. He must have earlier met Krishna Murari at least ten times. He used to talk to him because they belong to the same area. He had no other connection with Krishna Murari. He knew him for about three years. He had met Krishna Murari for the first time in a Barat of Kurmis, whereafter they had met quite often. His co-villagers also recognised Krishna Murari. He has further stated in his cross-examination that he had

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seen one mark of fire-arm shot in the bus. It was embedded in the body of the bus and was that of a rifle. He had not noticed the spent bullet on the floor of the bus. The left side of the wind screen was heavily broken, and pieces of glass had fallen inside the bus as well as out side. After the murder, Budhram, Rajendra and Indradeo had first of all entered the bus. The dead body was lying on the floor of the bus about "*एक से डेढ़ हाथ*" away from the driver's seat. While P.W.2 was perched on the *Tilha,* Vijay was visible from inside the bus. Dr. Ram Nandan is not M.B.B.S. Doctor. Budhram and Vijay were *Sarhus.* He has denied the suggestion that Suli, Arun and Krishna Murari have been made accused in the present case because they were witnesses in the case of the other Vijay.

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11.2) P.W. 2 has supported the prosecution case. His deposition is further noteworthy for the reason that he had recognised Krishna Murari in a situation where P.W.6 and P.W.1 have stated that they were unable to recall the name of the sixth accused person, although they claimed that they can identify him. He has further stated in his deposition that Dinesh, Devendra and Kishori were amongst the six persons who had come out of the clinic of Dr. Ram Nandan. He has also deposed that there existed a

Tilha between the clinic and the bus and he along with other P.Ws. stood on that. He has further deposed that there was a case relating to the other Vijay and he used to watch those proceedings. He had denied the suggestion that the case of other Vijay had given rise to a caste-frenzy in the area. He had stayed there until the arrival of the police which had reached 2-2$^{1}/_{2}$ hours after the occurrence which is consistent with the prosecution case that the Sub-Inspector of Police had received the information when he was attending a crime meeting at Biharsharif. He had noticed the gun-shot mark in the bus. The left side of the front wind screen was substantially broken.

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12. P.W.3 (Ram Lakhan Yadav) is an agriculturist and a resident of Nakatpura. He has deposed to the effect that about 17 months ago on a Friday at about 11.00 A.M., he was in a tea shop at Muhammadpur and was taking tea. A bus reached there and stopped. Six persons wielding fire-arms reached there on two motor-cycles and parked their motorcycles in front of the bus. They got down from the motor-cycles and surrounded the bus. Five persons stood at the gate for the passengers and forced them to come out of it after using abusive language. Vijay remained inside the bus. 5-6 persons emerged from the

shop of Dr. Ramanand and stood at the driver's gate. The accused persons were Arun Mahto, Shailendra Mahto, Bahadur Mahto, Kaushal Mahto, Suli Mahto and Krishna Murari Mahto. They got into the bus and shot at Vijay, whereafter they ran away. He recognised Bahadur Mahto, Shailendra Mahto, Arun Mahto, Kaushal Mahto and Suli Mahto who were present in court. Krishna Murari Mahto was not present in court. P.W.3 was a regular visitor to Muhammadpur and he had on that day reached there at about 10.00 A.M..

12.1) He has stated in his protracted cross-examination that the tea-shop owner used to send his servant with tea inside the bus but it did not happen on that day. Arun Mahto asked the driver to come out of the bus otherwise he would be shot dead. The driver was pulled out of the bus but did not run away out of fear and stood on the road. Khalasi got out of the bus through the rear gate. It had taken about five minutes for the passengers to come out of the bus and was coming out with small belongings in their hands. He had noticed Indradeo of his village there. He stood on a collection of stones situate at a distance of 5-7' from the bus along with others. He went over the mound of stones when the bus was being evacuated of the passengers some of whom stood near the mound. Vijay was shot-dead as soon as he stood up

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from the seat. After committing the murder of Vijay, the accused persons went away in different directions. He knew them for about 1 -$1^{1}/_{2}$ years. Arun Yadav was a leader and he knew him. He had gone to the lodge on invitation where the accused persons were living. He stayed there for about two hours after the occurrence and the police had reached there in his presence. Vijay Yadav deceased was engaged in cultivation at his Sasural.

12.2) His deposition is on the same lines as that of P.W.2 and is particularly noticeable for the reason that he has named Krishna Murari amongst the six accused persons who had come on the motor-cycles and done Vijay Yadav to death. He has fully supported the prosecution case, and the defence in its protracted cross-examination has not been able to elicit any contradiction.

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13. P.W.4 is Suresh Prasad, is an agriculturist, and a resident of Nakatpura. He is a formal witness and has proved his signature and that of Krishna Prasad on the seizure-list prepared by the Investigating Officer which have been marked Exhibits 1 and 1/1. On the same day, the investigating officer had prepared the inquest report and had put his signature thereon. Krishna Prasad had also recorded his signature thereon which has been marked Exhibits

1/2 and 1/3 respectively. The inquest report was prepared along with the carbon copy. He had put his signature at the road side of Muhammadpur at about 2.30 P.M. He had gone there on hearing hulla.

14. P.W.5 (Baudhu Gope) is an agriculturist and resident of Nakatpura. His deposition is on the same lines as that of P.Ws.2 and 3, and had gone to Dr. Ramanand's shop to obtain medicines for his wife. He has fully supported the prosecution case, and the defence has not been able to elicit any contradiction in his lengthy cross-examination. His deposition is particularly noticeable for the reason that he had also seen and recognised Krishna Murari amongst the six accused persons.

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15. P.W.7 is Rajo Yadav, an agriculturist, a resident of Nakatpura, and is a tendered witness.

16. P.W.8 is Jai Keshav Sharma and is the Investigating Officer. He has deposed to the effect that he was, on 7.3.1986, posted as Sub Inspector of Police at Asthawa Police Station. He had on that day at about 11.00 A.M., received information about the occurrence as well as the place of occurrence. He was then at Biharsharif and from there reached the place of occurrence at about 12.00 noon. He had recorded the statement of Budhram Prasad as per the version given by him which was read out to him and feeling

satisfied he had put his left thumb-impression. The Fardbeyan in the hand-writing of the investigating officer bears his signature and has been marked Exhibit.2, which was forwarded to Asthawa Police Station to be recorded as F.I.R. The formal F.I.R. is in the hand-writing of Ramanuj Ram, A.S.I.. He recognised his signature and has been marked Exhibit.3. He had taken the statement of Budhram for the second time and had inspected the place of occurrence. He has given the description of the place of occurrence and the position of the bus. The bus had stopped at the bus-stop. One dead body was found inside the bus near the engine. He has also given the description of inside of the bus. He had also found and collected the spent bullet of .315 bore of rifle. Lot of blood was found near the dead body. All the seats inside the bus were in a disturbed state. There were also marks of gun-shot inside the bus in the front portion. He has also given the description of the dead body and the manner in which it was lying. He has given the description of the wounds/injuries on the dead body which was covered with blood. He has given the description of clothes which he was wearing. Blood was found on the Kachcha as well as Pucca portion of the road underneath the bus. He also found the motor-cycle bearing No.BHE-94, lying on the

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ground about 100 yards from the bus. He had prepared three copies of the seizure-list with the help of carbon in the presence of Krishna Prasad Yadav and Suresh Prasad who had affixed their signature thereupon. The seizure-list and his signature has been marked Exhibit-4. He also prepared the inquest report with the signature of Krishna Prasad and Suresh Prasad recorded in his presence. The same has been marked Exhibit-5. He has also given the description of the motor-cycle which was seized in presence of Ram Nageena and Naresh Prasad. He had prepared three copies of the seizure-list with the help of carbon with the signatures of the witnesses. The seizure-list has been marked Exhibit-4/1. The Dy.S.P. and the Inspector of Police had also reached the place of occurrence. He then forwarded the dead body of Vijay Yadav for post-mortem along with the constables named therein. He has given reasonable details of the investigation. He has also stated in his deposition that he had recorded the statements of various witnesses. He had gone to village Balwapur in search of Krishna Murari but he could not be found. He concluded the investigation on the receipt of the post-mortem report. He had sent a blue-coloured shirt soaked in blood for chemical examination. He has also proved the material exhibits marked Exhibits-I to IV.

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He has, inter alia, stated in his lengthy cross-examination that he has received the information of the occurrence while he was attending the crime meeting presided over by the Superintendent of Police at Biharsharif. He has further stated in his cross-examination that in view of the statement of Indradeo Prasad he had raided the house of Dinesh and Devendra. He has also stated that he does not remember to have seen a *Tilha* in front of the medical shop of Dr. Ramanand.

16.1) On the prayer of accused Krishna Murari, P.W.8 was recalled for his cross-examination. His lawyer did not turn up for cross-examination and was, therefore, discharged on 5.12.1987. He was, however, subjected to a detailed cross-examination at the instance of accused Krishna Murari on 15.12.1987. He has, inter alia, stated in his cross-examination that he had recorded the statements of the driver and the conductor. He has further stated in paragraph 69 that the names of Devendra Mahto and Dinesh Prasad had come up during the course of investigation leading to raid of their houses but they were found absconding. But he did not pursue it any further. He has given a detailed narration of the course of investigation commencing with the receipt of information of the occurrence till the submission of the charge-sheet.

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He has proved exhibits which along with his oral testimony, fully support the prosecution case. The defence in its detailed cross-examination has not been able to elicit any contradiction.

17. P.W.9 is Dr. C.P. Sinha. He has stated in his deposition that he was then posted as Civil Assistant Surgeon. He has deposed to the effect that on 7.3.1986, he was posted as Civil Assistant Surgeon at Sadar Hospital, Biharsharif. On that day, at 4.30 P.M., he conducted the post-mortem on the dead body of Vijay Yadav, son of Kailash Yadav of Village Nakatpura, a male aged 25 years. He has proved the post-mortem report marked Exhibit-6, wherein he noted the following findings.

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(1) One circular penetrating bullet wound of 3/4" diameter with ragged lacerated inverted margin on the front of right side of chest at the level of 8th rib, fracturing it and piercing through the liver (entry wound) and passing out on the right side of the back with the lacerated circular opening of 2" diameter with a ragged everted circular margin.

(2) One penetrating bullet wound with the injury on right side of chest lateral to the nipple of 3/4" diameter with ragged inverted irregular margin piercing the right lung, heart, left lung and passing out with exit at the level of 11th rib

opening being of 2" diameter, causing the lacerated wound of $2^{1}/_{2}$"x2" on the left elbow medially.

The injuries were caused by fire-arm and were grievous in nature fired from a distance of about 25'-30'.

(3) On dissection abdominal cavity contained about two pounds of blood. Stomach contained six ounce of liquid with alcoholic smell. Intestines contained gasses and faecal matters.

(4) Urinary bladder was empty. Liver was lacerated.

(5) Both lungs and the heart were lacerated at their middle portion with left lung, lower lobe lacerated and blood present in thoracic cavity of about three pounds.

(6) Brain, spleen, and Kidneys were pale. Genetalia were normal.

(7) In my opinion, the death occurred due to fire-arm injuries described above leading to shock and haemorrage. The time elapsed between the death and P.M. about 8-12 hours.

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17.1) He has stated during the course of cross-examination that process of digestion does not continue after the death of the man. Alcohol is not as easily digestible as water. Vegetarian diet digest faster provided there is less quantity of fat in it. His finding regarding the distance of firing cannot

vary from 2 to 3 feet both sides. He has denied the suggestion that his deposition to the effect that finding regarding the presence of alcoholic smell in the stomach, and the distance of firing, has been given to help the accused. The direction in injury nos.1 and 2 were resulting from firing down-ward suggesting that the shooter was on a higher place. If shooter and the deceased are on the same level, then the bullet will passes through his body horizontally.

17.2) He was sought to be subjected to separate course of cross-examination at the instance of accused Krishna Murari but was discharged because none appeared to cross-examine him on 5.12.1987. He was, however, subjected to cross-examination at the instance of accused Krishna Murari on recall on 4.1.1988. He has, inter alia, stated that injury no.1 was alone sufficient to cause death in ordinary course of nature. One can survive for about half an hour after sustaining injury no.1. Apart from the two injuries, he has emphasised and also stated in his post-mortem report that he has found two fire-arm injuries on the dead body. He did not find any other injury like abrasion, bruise or scuffling mark on the dead body. He found six ounces of alcohol in the dead body which was sufficient to cause intoxication. He cannot say that the deceased was a habitual drunkard.

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17.3) In view of the consistent, trust-worthy, and unshaken testimony of the eye-witnesses, the evidence of P.W.9 needs very close scrutiny.

18. The defence has examined one witness to prove the plea of alibi on behalf of Arun Mahto. D.W.1 is Dr. Suresh Kumar Verma. He has deposed to the effect that he is posted as Assistant Professor at Shri Krishna Medical College, Muzaffarpur, since 24.10.1981. He has Post-graduate degrees. He works in the hospital from 8.00 to 12.00 A.M. during summer, and from 8.30 A.M. to 12.30 P.M. during winter, besides teaching in the college. He also attends to the outdoor patients in the department. The prescriptions are issued to the out-door patients as per the register. He had worked in the out-door patient department on 7.3.1986. He had examined Arun kumar aged 26 years, son of Ambika Prasad Singh of village Naya Bidha, P.S. Barh. He was suffering from bleeding nose. As an out-door patient, he had given him prescription and had prescribed the medicines. He had examined the patient thoroughly, and had also cauterised the bleeding point in his nose. He has identified the patient standing in the dock of the court room. He has proved the prescription written in his own hand-writing and is marked Exhibit-A. The entry number of this prescription is E.N.T./927, dated

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7.3.1986, which also bears the seal of the Sadar Hospital, Muzaffarpur. He has not brought the out-door patient register from the Sadar Hospital, Muzaffarpur. He has brought a photo copy of the relevant entry of out-door register. He had examined the patient between 10.00 A.M. to 11.00 A.M. He usually devotes about ten minutes in examining one patient. Exhibit-A does not mention the identification mark of the patient. He identified the patient because he had been to him with the court's summons and had also shown to him a photo copy of the prescription (Exhibit-A). He has also six fingers in one of his legs which is not stated in Exhibit-A. He has denied the suggestion that he has manufactured Exhibit-A.

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19. The accused persons had thereafter made statements under Section 313 of the Cr.P.C.. They denied their involvement in the alleged offence and claimed to be tried.

20. On a consideration of the materials on record and the submissions of the learned counsel for the parties, the learned trial court held that the prosecution has been able to prove the place and the manner of occurrence as stated in the Fardbeyan. He has further held that the medical evidence supports the prosecution case. He has next held that, as per the post-mortem report, the variation of time of about

2-3 hours is not of much consequence. He has also dealt with the finding in the port-mortem report that fatal shots were fired from 20-25′ which is inconsistent with the prosecution case and held that it does not hit the core of the prosecution case. He has next held that no adverse inference can be drawn on account of non-production of the clothes of the deceased which he was wearing at the time of his death and is not fatal to the prosecution case. Failure to produce independent prosecution witnesses is also not material in this case. Non-production of Indra Deo and other witnesses mentioned in the F.I.R. also does not hit the prosecution case. He has further held that the driver and the conductor ought to have been examined as prosecution witnesses. He has next found that in view of the position that the post-mortem report has found small quantity of liquor in the stomach of the deceased does not lead to the conclusion that he was a criminal and had been killed elsewhere. The learned trial court has also considered the issue whether or not *Tilha* existed between the bus and the clinic of Dr. Ram Nandan and has held that the discrepancy in the prosecution case and the deposition of the I.O. is not a serious lacuna in the prosecution case. He has also found the motive to kill Vijay Yadav is that one Sudhir Mahto was some years ago killed at Nakatpura.

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He has rejected the plea of alibi set up by Arun Mahto. He has also found that Krishna Murari was one of the six persons who had come on the two motor-cycles, had got into the bus to kill Vijay Yadav, and absence of his name in the F.I.R. does not entitle him to acquittal. The accused persons had the common intention to eliminate Vijay Yadav.

21. Learned counsel for the appellant Arun Mahto has led the main attack before us. He has not challenged the place and the mode and manner of occurrence. He has challenged the involvement of Arun Mahto in particular, and the appellants in general, on various counts, with extra emphasis on the post-mortem report. He submitted that the medical evidence has rendered the testimony of the eye witnesses completely false. He has relied on the following reported judgments:

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(i) **A.I.R. 1987 S.C. 826(Amar Singh and others v. State of Punjab) paragraph 9.**

(ii) (2003)3 S.C.C. 153 (State of Punjab v. Sucha Singh and others) paragraphs 8 and 10

(iii)(2003)6 S.C.C. 380 (Thaman Kumar v. State of Union Territory of Chandigarh), paragraph 16.

According to the eye witnesses, the assailants had fired six fire-arm shots at the deceased, but the post-mortem report suggests that the deceased had sustained only two shots. This rules out the possibility of more than two persons participating in the assault. He relies on the following reported judgments:

(i) A.I.R. 1976 S.C. 2263 = (1976)4 S.C.C.394 Lakshmi Singh and others v. State of Bihar) paragraphs 14 and 15.

(ii) A.I.R. 1987 S.C. 826 (Amar Singh and others v. State of Punjab) paragraph 9.

(iii) A.I.R. 1991 S.C. 4(Budhwa, alias Ramcharan and othes v. State of Madhya Pradesh).

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He has also submitted that the direction of fire was from up to down which also falsifies the eye witnesses. He relies on the judgment reported in **A.I.R. 1988 S.C. 1158 (Awadhesh and another v. State of Madhya Pradesh).** It has also been submitted that in view of the position that the eye witnesses entered into a conspiracy to falsely implicate innocent persons, no reliance can be placed on any part of their testimony to convict a single accused. He has also submitted that the medical evidence also falsifies the prosecution case that the incident took

place at 11.00 A.M. after the deceased had taken his morning meal. In fact, the medical evidence indicates that the murder was perpetrated between 4.00 A.M. to 8.00 A.M., before the deceased had performed his morning ablutions and before he had taken the morning meal.

22. The learned Public Prosecutor has submitted that the Fardbeyan was recorded promptly eliminating all chances of false implication. Law is well settled that the real assailants cannot be acquitted because some body has been wrongly implicated or wrongly left out. He next submits that all the eye-witnesses have consistently stated that the bus had reached Nakatpura at 11.oo A.M., and the entire occurrence was over in about 10 minutes' time. In view of the clear evidence on this point, the different time of death given in the post-mortem report has to be rejected as false and collusive. In any case, medical science is not so developed as to give the exact time of death. He relies on the following reported judgments:

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(i) A.I.R. 1985 S.C. 1715= (1985)4 S.C.C. 80 (Pattipati Venkaiah Vs. State of Andhra Pradesh), paragraph 10.

(ii) (2008)1 S.C.C. (Cri) 64 (Budh Singh Vs.State of M.) paragraphs 14 and 18.

He next submits that the illegalities and/or the irregularities in the investigation do not by itself affect the prosecution case which really depends on the substantive evidence. He relies on the judgment in **Budh Singh** (paragraph 26) (supra). He next submits that Arun had fired the first two shots from point-blank range as a result of which Vijay had fallen down and died. This was followed by indiscriminate firing from some distance within the bus which may have pierced the wind-screen and gone out. He relies on the following reported judgments:

(i) (1997) S.C.C. (Cri) 716 (Mithilesh Upadhyay v. State of Bihar).

(ii) 2002 S.C.C. (Cri) 175 (Munshi Prasad & others Vs. State of Bihar).

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He next submits that six persons had come on two motor-cycles variously armed, were a determined lot and performed their criminal act with remarkable planning, confidence, determination, and precision. They are obviously liable under section 302 read with Section 34 of the IPC. In view of the consistent evidence of the prosecution witnesses on each and every aspect of the matter, the medical evidence is false and collusive and meant to support the accused persons. He next submitted that non-examination of independent witnesses is not of much consequence.

Reliability of the prosecution witnesses is of vital importance. He submits in the same vein that examination of the driver and Khalasi would have been a better course for the prosecution but their non-examination will not affect the prosecution case for the said reason. He relies on the following reported judgment:

(i) A.I.R. 1994 S.C. 1029 (Lakhbir Singh & Anr. V. State of Punjab).

He next submits that the eye-witnesses had not intervened and did not make attempt to save and protect Vijay Yadav out of sheer fear, which is a natural conduct. He relies on the following reported judgment:

(i) A.I.R. 1988 S.C. 696 (Appabhai and Another Vs. State of Gujrat).

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23. We have perused the materials on record and considered the submissions of learned counsel for the parties. P.W.6 (Budhram Prasad), the informant, is the *Sarhu* (co-brother) of the deceased. Both of them were *Gharjamai* because their father-in-law does not have a son. He has stated in the Fardbeyan that both of them had left village Nakatpura together and were travelling in the same bus of Rajya Transport, namely, BHY-1355. Vijay Yadav had occupied the very front seat behind the wind screen and was separated from the

driver by the engine. The informant had also occupied one of the front seats. He has further stated that it had taken about 10 minutes to cover the distance between Nakatpura and Muhammadpur. The bus had stopped at Muhammadpur to enable the passengers to get down, and to enable the new passengers to get in, and for that purpose the bus stopped opposite the clinic of Dr. Ram Nandan. He has further stated that there was a *Tilha* of waist height between the bus and the clinic. As soon as the bus had stopped opposite the clinic of Dr. Ram Nandan, two motor-cycles with six persons came there and parked their motor-cycles in front of the bus. He has in the Fardbeyan mentioned the names of the accused persons as Shailendra Mahto, Surendra Prasad alias Suli, Kaushal Mahto, Bahadur Mahto and Arun Mahto. He has further stated that he was unable to recall the name of the sixth person. As soon as they got down from the motor-cycles, Arun Mahto stood at the driver's door and threatened him at gun point to get out of the bus. The other five persons went to the rear gate meant for the passengers and forced them to get out of the bus by using abusive language and at gun point. All the six persons were wielding fire-arms. Arun Mahto was with a rifle. This was simultaneously followed by emergence of 5-6 persons variously armed from the clinic of Dr. Ram Nandan who stood behind

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Arun Mahto. The driver got out of the bus under threat, whereafter Arun Mahto paced towards the rear gate and stormed into the bus followed by the remaining five persons. It appears that Arun Mahto proceeded towards Vijay Yadav and fired two shots at him as a result of which he dropped dead. It further appears that the remaining five appellants also got into the bus and had fired shots. He has further stated that he along with some other co-villagers of village Nakatpura had got upon the aforesaid *Tilha* and were in a position to watch the happenings inside the bus. He has further stated that soon after Vijay Yadav dropped dead, all the six persons fled away on their motor-cycles, one of which slipped at some distance away. They abandoned the motor-cycle and ran away towards Village Sherpur. He has further stated that one Sudhir Mahto of Village Nakatpura had been murdered a few years ago and this was the reason and the motive for the murder of Vijay Yadav.

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P.W.6 has, in his deposition, fully supported the prosecution case. Equally P.Ws.1, 2, 3, and 5 have fully supported the prosecution case. P.W.8 (I.O.) has also fully supported the prosecution case, except that he does not remember to have noticed the *Tilha.* In our view, this is not of any consequence for the reason that the aforesaid prosecution witnesses,

who are co-villagers, were obviously close to the deceased and must have been interested in his welfare and stood on the *Tilha,* giving them some height so that they could see the happenings in the bus. They have consistently stated about the existence of the *Tilha,* and the omission on the part of P.W.8 (the I.O.) to notice it does not make it non-existent, nor the evidence of the aforesaid prosecution witnesses to that extent is adversely affected. It is a possible situation that in the nervousness of a close person having being shot dead in such a brutal manner, the prosecution witnesses might have failed to bring the same to the pointed notice of the investigating officer. On a perusal of the deposition of P.W.8, it appears to us that he had failed to notice it. He has not stated that it was pointed out to him and he did not find it. The *Tilha* does not appear to be so raised that it would without fail attract attention. Furthermore we cannot ignore the reality in India, particularly in villages where needlessly assembled piles of earth or stones is found, and may not always attract attention. We are, therefore, of the view that failure on the part of the I.O. to notice the *Tilha* is a minor omission and does not cut at the prosecution case. We, therefore, find and hold that the

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prosecution has been able to prove the place and the manner of occurrence.

24. We may now consider the medical evidence. From a perusal of the post-mortem report, it appears that there were five holes in the body, two of which are entry wounds and three of which are exit wounds. According to the medical report, the five holes seem to have been caused by two bullets. On the other hand, the eye witnesses have deposed that Arun had fired at a point blank range. It appears that the two shots that he had fired really hit the deceased and had killed him. He had obviously fired while standing, and the eye-witnesses have deposed that Vijay was sitting in his seat, as a result of which he died. The eye witnesses have undoubtedly stated that the remaining five accused persons, who were standing inside the bus in the rear, had also fired. We must, however, notice the finding in the post-mortem report that the two shots had been fired from a distance of 25' to 30'. This obviously is an error on the part of the doctor in view of the consistent evidence of the eye witnesses that Arun Mahto had fired from a point-blank range. It is further relevant to state that the eye-witnesses, particularly P.W.2, have stated that the Rajya Transport bus was in a very poor condition and

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the shots, if any, fired by the five persons from the rear may have made their exit through the wind-screen which had broken down.

25 It further appears from the medical evidence that the time elapsed between death and the post-mortem was 8-12 hours. The post-mortem had commenced at 4.30 P.M. which takes the time of occurrence back to 5.00 A.M. to 8.00 A.M.. This is obviously an error in the post-mortem report because we have already found hereinabove that the bus had undoubtedly reached the place of occurrence at 11.00 A.M., and the crime was completed within a period of 10 minutes. Furthermore, such an assessment of time of death is based on estimate coupled with experience and no scientific full-proof clinical formula is available to assess the exact time of death.

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26. Learned counsel for the appellants has also placed emphasis on the finding in the post-mortem report that P.W.6 has deposed to the effect that they had together taken food and left for the journey. On the other hand, the post-mortem report does not find presence of food particles in the stomach. On the contrary, it contained gases and faecal matters. In this connection, the deposition of P.W.6 has to be read as a whole. Though he has stated that he and Vijay Yadav had taken their food together, but says in

the same vein that they had not eaten together and was not aware as to what Vijay had eaten. It is just possible that Vijay may not have eaten anything. Furthermore, there is omission in the post-mortem report to mention this. We have found the evidence of the eye witnesses trust-worthy and, therefore, the post-mortem report will have to give way to the evidence of the eye-witnesses. There is no inconsistency between the two. This explains the medical report as a whole which on the whole is not so inconsistent with the evidence of the eye witnesses that the two cannot exist side by side.

27. The conflict between the evidence of eye-witnesses and the medical evidence has been the subject matter of a large number of judicial pronouncements. Law is well settled that medical evidence is not gospel truth, is at the instance of doctors who are human beings capable of both making mistakes and of falling prey to usual human failings. If the evidence of eye-witnesses is trust-worthy, and the medical evidence is doubtful, then the latter will give way to the former.

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28. The judgment of the Supreme Court reported in **A.I.R. 1998 S.C. 2606 (State of Bihar v. Ram Padarath Singh and others**) may be considered. The trial court had convicted the accused persons under

section 302 read with sections 34/149 IPC. The High Court found discrepancies between the ocular evidence and the medical evidence, discarded the former, and gave preference to the latter. The Supreme Court on appeal restored the judgment of the trial court after holding that the High Court was not right in rejecting the evidence of the eye-witnesses which had led to miscarriage of justice. The inconsistency was not such that the two cannot stand together. Paragraph 8 and 18 are reproduced hereinbelow for the facility of quick reference:

> ... ...
> ... ...
> But what the High Court failed to appreciate was that all the eye-witnesses had seen the incident from some distance.
> ... ...
> ... ...
> on the basis of such an inconsistency or discrepancy it was not proper for the court to raise a doubt regarding the witnesses having seen the actual assault on Boudhu.
> ... ...
> ... ...
> No doubt, to that extent their evidence can be said to be inconsistent with the medical evidence. But it is not an inconsistency of that type where one can say that the ocular evidence and the medical evidence cannot stand together and which would justify raising of a doubt regarding the truthfulness of the evidence of the eye-witnesses. The inconsistency clearly appears to be the result of confusion and does not indicate an attempt to describe the incident by a person who had not really seen it. The

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> High Court therefore was not right in rejecting the evidence of the eye witnesses as regards the assault on Boudhu, on these grounds."
>
> **(Emphasis added)**

28.1) The Supreme Court has observed in its judgment reported in **(1990)3 S.C.C. 190= 1990 S.C.C. (Cri)378= A.I.R. 1990 S.C. 1459 (Vijayee Singh v. State of U.P.)** that where the evidence is clear, cogent and creditworthy, and where the court can distinguish the truth from falsehood, the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence, and consequently the whole case, where the evidence is so clear and cogent, so independent and uninterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission on the part of the prosecution to explain the injuries.

28.2) It has been observed in **(1973)3 S.C.C. 881= 1973 S.C.C. (Cri) 563= A.I.R. 1972 S.C. 2593 (Ram Lagan Singh vs. State of Bihar)** that the prosecution is not called upon in all cases to explain the injuries received by the accused persons. It is for the defence to put questions to the prosecution witnesses regarding the injuries of the accused persons. When that is not done, there is no occasion

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for the prosecution witnesses to explain any injury on the person of an accused.

28.3) It has been observed in **(1988)2 S.C.C. 95= 1988 S.C.C. (Cri) 279= A.I.R. 1988 S.C. 863 (Hare Krishna Singh v. State of Bihar),** that the obligation of the prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. In other words, it is not an invariable rule that the prosecution has to explain the injuries sustained by the accused in the same occurrence. If the witnesses examined on behalf of the prosecution are believed by the Court in proof of guilt of the accused beyond reasonable doubt, question of obligation of the prosecution to explain injuries sustained by the accused will not arise. When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and under what circumstances injuries have been inflicted on the person of the injured.

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28.4) The observations of the Supreme Court in its judgment reported in (**2005) S.C.C.(Vol.1) (Cri) 178= 2004 Cr.L.J. 4881 (Anil Kumar v. State of U.P.),** are relevant in the present case. Paragraph 12 is reproduced hereinbelow:

... ...
... ...

"The presumption that FIR was ante-timed was on an erroneous reading of the evidence of P.W.3. The trial court completely lost sight of the fact that P.W.3 was an illiterate rustic lady and minor variance in her statement should not be given primacy when the evidence itself was recorded long time after and it should not have been made the basis for coming to a conclusion that the FIR was ante-timed. It is trite law that when oral evidence is credible and cogent, that medical evidence is to the contrary, is inconsequential. Only when the medical evidence totally improbabilises the oral evidence, can adverse inference be drawn. This is not a case of that nature. "

29. It thus appears to us that law is well settled that in case of conflict between the evidence of the eye-witnesses and the medical evidence, the latter can in appropriate cases give way to the former provided the eye-witnesses are consistent and trust-worthy. No sanctity is attached to the medical report and it is just another piece of evidence capable of errors and liable to common human failings. The present case is really covered by the aforesaid judgments of the Supreme Court in, particularly **State of Bihar v. Ram Padarath Singh** (supra). The inconsistency between the prosecution witnesses and the medical evidence in the present case is not such that they cannot stand together. All the eye-witnesses had seen the occurrence while standing on the *Tilha* a little distance away from

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the bus. They had consistently deposed that Arun Mahto had fired the first shot(s) as a result of which Vijay Yadav fell down. P.W.6 has stated in paragraph 37 of his deposition as follows:

"37. *सबसे पहले अरुण ने गोली मारी जिससे वह गिर गया..."*

This was followed by the five shots from the fire-arms of the other five accused persons standing in the rear of the bus. It is obvious that the shots fired by these five appellants had passed over Vijay Yadav who had already fallen on the ground and the shots had pierced the wind-screen and had gone out of the bus.

P.W.2 has stated in his deposition that the wind-screen had broken down, as a result of which pieces of glasses of the wind-screen had fallen inside and outside the bus. Furthermore, as has been observed by the Supreme Court in **Ram Lagan Singh V. State of Bihar** (Supra), the prosecution is not called upon in all cases to explain the injuries received by the accused persons. It is for the defence to put questions to the prosecution witnesses regarding the injuries of the accused persons. When that is not done, there is no occasion for the prosecution witnesses to explain any injury on the person of an accused. As has been stated by the Supreme Court in the **State of Bihar V. Ram Padarath Singh** (supra),

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that on the basis of such an inconsistency or discrepancy it was not proper for the court to raise a doubt regarding the witnesses having seen the actual assault.

30. It thus appears to me that the evidence of the eye-witnesses is consistent, creditworthy, and without any contradictions. The apparent inconsistency in the medical evidence is of minor nature, is such that it does not affect the core of the prosecution case, and is not such that the two cannot stand together. The defence did not at all cross-examine the prosecution witnesses to explain the absence of all the alleged injuries on Vijay. In fact, presence of two shots instead seven is clearly explained by the evidence of eye-witnesses that the shots of the five accused from the rear of the bus had their exit through the wind-screen which was found broken and the glass pieces were found scattered inside as well as outside the bus. The bullets must have landed at some distance away from the bus, and it may not have occurred to anybody to locate and collect the spent bullets. The murder of Vijay was thus the result of the concerted action of the six appellants.

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31. Learned counsel for the appellant has submitted that the murder of Sudhir Mahto in 1983 led

to the formation of two groups, namely, Kurmis versus yadavs and became inimical to each other. In his submission, in cases of group rivalries, there is a tendency to falsely implicate innocent persons. He has placed reliance on the judgments reported in **A.I.R. 1991 S.C. 4 (Budhwa v. State of M.P.) and A.I.R. 2002 S.C. 1949 (Bijay Singh v. State of Bihar).** The contention is stated only to be rejected. There is no evidence on record to support this submission. On the contrary, P.W.2 has stated in his deposition that the murder of Sudhir Mahto had not led to any perpetual group rivalry and enmity. Paragraph 17 of his deposition is reproduced hereinbelow:

> "17.*जब विजय (इस वाद के म्रतक नहीं) का मुकदमा चल रहा था तो मुकदमे की काररवाई देखने मैं न्यायालय में आता था/ ऐसी बात नहीं है कि उस मुकदमे के कम में एक जातिवाद का माहौल हो गया था जिसमें कुरमी एक तरफ तथा ग्वाला दूसरी ओर हो गये थे/*"

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Furthermore, culpability of the appellants has been clearly established by substantive evidence. The reported judgments are inapplicable to the present case.

32. Some argument was advanced also on the question of motive. It appears that Sudhir Mahto was killed at Nakatpura and people of the Mahto community entertained doubts that Vijay Yadav was instrumental in the murder of Sudhir Mahto. The motive is thus

established. In any case, law is well settled that motive need not necessarily be proved to establish the culpability of the accused. It often happens that the accused alone knows what moved him to a particular course of action. The evidence of the prosecution witnesses in the present case establishes the motive on the part of the accused persons to kill Vijay Yadav. In any case, the murder of Vijay Yadav has been fully established on the basis of evidence on record de horse motive.

33. Learned counsel for the appellants has also contended that Indra Deo Yadav had been interrogated by the police who had mentioned the names of Dinesh and Devendra as culprits but he did not name the six appellants. It appears to us in view of the materials on record that the police had raided the houses of Dinesh and Devendra who were absconding and did not pursue it any further. It appears to us that this does not adversely affect the prosecution case because the I.O. was able to solve the mystery and were able to trace the accused persons with materials to support the charge-sheet. The police did not, therefore, feel the necessity of pursuing Indra Deo, Dinesh and Devendra.

34. The six persons who came out of the clinic of Dr. Ram Nandan had surely stood at the

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driver's gate, behind Vijay Yadav, and had not committed any overt act. Paragraph 30 of the deposition of P.W.6 is reproduced hereinbelow:

"30.डा0 राम नन्दन के दवाखाना से जो छः आदमी आये वे गोली आदि नही चलाये"

Even if it is conceded that the six persons who had emerged from the clinic of Dr. Ram Nandan and all or a few of them were armed, the police could have filed charge-sheet against them under section 302 read with section 149 of the IPC. The police, however, in exercise of its powers of investigation and formation of opinion did not submit charge-sheet against them which, if challenged at that stage, could have been examined by the court. It remained unchallenged and, therefore, submission of the charge-sheet excluding them became final. Law is well settled that if a person has been wrongly let off, then that does not become a ground for acquittal of the charge-sheeted persons. The contention is rejected.

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35. Learned counsel for the appellants has further submitted that the bus had stopped in a busy area of Muhammadpur where a large number of local persons had assembled, none of whom has been examined. It is common experience that people by and large keep away from criminal cases to avoid the harassment of

police station and courts and also to avoid the wrath of the accused persons. The deceased was obviously of a different village and, therefore, they may not have been much aggrieved, or concerned about him. Law is well settled that non-examination of one or the other witnesses is not of much consequence. The credibility of the prosecution witnesses is of vital importance. Supreme Court has observed in **State of Bihar Vs. Ram Padarath Singh** (supra), that veracity of eye-witnesses cannot be doubted on the ground that no independent witness from the nearby place was examined. Paragraph 10 of the judgment is reproduced hereinbelow:

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> "10. The High Court also rejected the evidence of the eye-witnesses on the ground that no independent witnesses from the nearby place namely Koria Haibatpur, were examined by the prosecution. According to the High Court, it created a doubt regarding the eye-witnesses being genuine and their evidence being truthful. The High Court failed to appreciate that the incident had happened near the embankment at a little distance from Koria Haibatpur Chowk. Nothing was brought out in the evidence of any of the prosecution witnesses, including the investigating officer, to indicate that any other person was present near the place of the incident or that he had seen the incident. In absence of such material on record, the High Court was not justified in assuming and then proceeding on the basis that independent witnesses must have been available and yet they were not examined by the prosecution. The

> prosecution had examined two persons Navin Rai and Biso Kunwar who were passing by the Koria Haibatpur Chowk. There is nothing on record to show that they were in any manner connected with Subhash and his brothers or inimical to the accused. If independent persons were not willing to tell the police that they had seen the incident, the prosecution cannot be blamed for not examining independent persons as eye-witnesses and veracity of the evidence of the witnesses examined as eye-witnesses cannot be doubted on that ground. The High Court was, therefore, not justified in disbelieving the evidence of the eye-witnesses on this ground. "
>
> **(Emphasis added)**

36. Learned counsel for the appellants has further submitted that the evidence of P.W.6 (Budhram), the informant, to the effect that Hira Kotwal lodged a report with Asthawa Police Station which has been withheld by the prosecution because it was contrary to the present prosecution case. It is difficult to accept the submission because there is no evidence on record to show that he had lodged a first information report in writing. The deposition really creates the impression that he had orally informed Asthawa Police Station of the occurrence.

37 Learned counsel for the appellants next submitted that none of the prosecution witnesses, who are all co-villagers, made any attempt to protect and save Vijay. The persons present there, including those

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of Nakatpura, must have felt over-whelmed by the brute force at the command of such a large number of persons *'दो कोस'* away from their village. All of them were completely unarmed and must have felt helpless. Any interference or attempt to help Vijay would have meant inviting death. P.W. 6 has stated in his deposition as follows:

> 25. "...*मैंने डर से विजय को छूड़ाने का प्रयत्न नहीं किया...*"
>
> "27. *मुहम्मदपुर में मेरी जान-पहचपन के लोग है/ मैंने बस से उतरकर मुहम्मदपुर के कुछ आदमी को कहा कि विजय को बचाने का उपाय किया जाय पर वे बोले कि हमसे क्या कहते हो/ मुहम्मदपुर मे भी यादव लोग हैं/ ...विजय बस से झांक रहा था/ उसने हमलोगों को मदद के लिये पुकारा/ मैंने कहा कि मैं क्या करुं क्या उपाय है/ मेरा कोई उपाय उन्हें बचाने का नहीं चला/*"
>
> 31. "*वहां उपस्थित यात्री लोग एवं दुकानदार घटना को चुपचाप देखते रहे/ कोई भी आदमी या कोई दुकानदार मुदालहों को रोकथाम करने वहां नही आया/*"

It appears to us on a perusal of the entire materials on record including the extracted portion of the evidence of P.W.6 that the people felt over-whelmed by the brute force at the command of the accused persons who were afraid of losing their own lives, felt helpless, and did not intercede on behalf of the deceased.

38. Learned counsel for the appellant Krishna Murari has adopted the arguments advanced by learned counsel for the appellant Arun Mahto. He has,

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however, submitted that neither the Fardbeyan, nor P.W.6 in his deposition, mention the name of Krishna Murari. It appears to us that the correct position is that the Fardbeyan as well as P.W.6 state that there was a sixth person whose name he was unable to recall whom he will be able to recognise on seeing him, and not that there was no sixth person. In view of the materials on record, Krishna Murari was charge-sheeted. P.Ws.2, 3, 5 and 8 have stated the name of Krishna Murari as the sixth accused. The contention is, therefore, rejected.

39. Learned counsel for the remaining appellants have adopted the arguments advanced by learned counsel for the appellant Arun Mahto. They have advanced some arguments in addition which have really been covered by the contentions advanced on behalf of Arun Mahto and, therefore, do not need separate consideration.

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40. In the result, the appeals are dismissed and the impugned conviction and sentences are hereby upheld. Arun Mahto is convicted under section 302 of the IPC, and sentenced to undergo rigorous imprisonment for life. The remaining accused persons are convicted under section 302 read with section 149 of the IPC. I am mindful of the position that the learned trial court has convicted the remaining

appellants under section 302 read with section 34 of the IPC. Law is well settled that in appropriate cases, the conviction under section 302 and 34 of the IPC can be converted into one under section 302 read with section 149 of the IPC provided no prejudice has occurred to them. We see none in this case. In view of the presence of five persons, which is an essential ingredient of section 149 IPC, the remaining appellants are convicted under section 302 read with Section 149 of the IPC, and are sentenced to undergo rigorous imprisonment for life. Their bails bonds are cancelled and are directed to surrender before the learned trial court forthwith to serve out the remainder of their sentences.

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(Sudhir Kumar Katriar,J.)

S.M.M.Alam, J. I agree.

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(Syed Md. Mahfooz Alam, J.)

Patna High Court, Patna
Dated the 16th day of September, 2008
S.K.Pathak/ (A.F.R.)

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